Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Section 73.606(b)	)	
Table of Assignments for	)	
TV Table of Allotments,	)	MM Docket No. 01-323
Television Broadcast Stations,	)	
(Vernal and Santaquin, Utah,	)	
Ely and Caliente, Nevada	)	

To: The Commission

JOINT REPLY COMMENTS OPPOSING PROPOSED REALLOTMENTS

Utah television stations KSL-TV, KUED(TV), and KULC(TV), and Utah noncommercial/educational FM Stations KBYU-FM, KCPW(FM), KPCW(FM), KOHS(FM), KPGR(FM), KRCL(FM), KUER-FM, KUSU-FM and KWCR-FM (collectively, "the Joint Commenters"), pursuant to Section 1.415 of the Commission's rules, hereby file their joint reply comments (a) in opposition to the joint initial *Comments* of TV 6, L.L.C. ("TV6") and Kaleidoscope Foundation, Inc. ("*Petitioners' Comments*"), and (b) in support of the comments of Ronald L. Ulloa, ("Ulloa"). As described below, the *Petitioners' Comments* are based on logical inconsistencies (with respect to the treatment of unbuilt television stations in an allotment priority analysis) and on fundamentally flawed assumptions in the relevant white and gray area studies.

I. BACKGROUND

In their initial comments, the Petitioners continue to treat the proposed reallotment of channel 6 from Vernal to Santaquin, Utah ("*Santaquin reallotment*"), and the simultaneous

reallotment of channel 6 from Ely to Caliente, Nevada ("*Caliente reallotment*") (collectively, the "proposed reallotments"), as routine reallotments of NTSC television stations. Ulloa and the Joint Commenters, however, demonstrated in their respective initial comments that the Commission *must* take into consideration the fact that the channel 6 allotments at issue have no digital pair and will be used for digital television ("DTV") service and, therefore, that the reallotments would be inconsistent with the Commission's policy discouraging use of digital allotments on channel 6.

The Joint Commenters also demonstrated, among other things, the following:

- the Commission should not have accepted the underlying Petition For Rulemaking which essentially requests a new channel 6 allotment in Santaquin because it has announced that it is no longer accepting petitions to amend the existing TV Table of Allotments to add new NTSC stations;
- the Petitioners' underlying Petition is deficient because it failed to provide all the technical studies the Commission requires to demonstrate non-interference by a digital channel 6 to existing non-commercial/educational ("NCE") FM stations; indeed, the Petitioners do not even attempt to bear their burden of persuasion to negate the Commission's clearly expressed preference to avoid allotting channel 6 for DTV unless absolutely necessary (especially in the context of moving to an area with numerous NCE FM stations);
- under long-standing comparative criteria, the proposed reallotments are not preferable to the existing allotments because, contrary to television priority No. 1, the Commission's data show that not only would fewer *Utah* residents receive their first television reception service under the proposed reallotments in comparison to the existing allotments, but fewer *combined Utah and Nevada* residents would receive their first television reception service;
- adoption of the proposed reallotment will result in interference to the signal of Salt Lake City television station KSL-TV; it also will pose interference concerns to the numerous NCE FM stations in the Salt Lake City/Provo area and potentially preclude them from making necessary modifications or desired enhancements to their FM facilities and services in the future; and
- the negative effects of these factors in a comparative evaluation is heightened by the fact that the proposed reallotments seek to move a Utah television station allotment approximately 120 miles across the state to an area that is already well served by at least a dozen television stations while the area being abandoned does not currently receive a single grade B signal.

Nothing in the *Petitioners' Comments* counters the negative public interest impacts summarized above that would result from the proposed reallotments. While Petitioners continue to effectively ignore the significant issues implicated by operation of channel 6 in the Salt Lake City/Provo area, they submitted new white and gray area technical studies that further confuse an already muddled record. These new studies and other issues Petitioners raised in their initial comments are addressed below.

II. NOT ONLY HAVE THREE WIDELY DIFFERENT SETS OF WHITE AND GRAY AREA DATA BEEN PRESENTED IN THIS PROCEEDING (THEREBY PRECLUDING ADOPTION OF THE PROPOSED REALLOTMENTS ON THE CURRENT RECORD), BUT THE PETITIONERS' DATA SHOULD BE DISREGARDED AS RELIANT ON UNREASONABLE ASSUMPTIONS

In their underlying Petition, the Petitioners submitted white and gray area studies that purported to show white area gains for both the *Santaquin reallotment* and the *Caliente reallotment.* In issuing the *Notice of Proposed Rulemaking* (DA 01-2736, issued November 14, 2001) ("*Notice*"), however, the Commission appropriately conducted its own study. The Commission's data showed that not only would fewer *Utah* residents receive their first television reception service under the proposed reallotments in comparison to the existing allotments, but fewer *combined Utah and Nevada* residents would receive their first television reception service.[1]

In their initial comments, the Petitioners now present a third set of white and gray area data. This third set differs widely from Petitioners' original data and from the Commission staff's data. For example, Petitioners' original data showed a net white area population gain for the *Santaquin reallotment* of 42,215, while the Petitioners' new data shows a large reduction in the magnitude of the claimed net population gain, now just 13,440. These claimed gains,

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[1] *Notice* at ¶¶ 6-8.

however, do not correspond at all with the Commission staff's data showing that the *Santaquin reallotment* would result in a net white area population *loss* of 8,844 persons. It is apparent that the Petitioners and the Commission staff operated under different assumptions.

Even if the Commission does not reject the Petitioners' data entirely – which, as explained below, the Commission should do – the Commission at the least would need to issue a new Notice of Proposed Rulemaking in which it would reconcile the three sets of white/gray area data.[2] The Administrative Procedure Act provides the public the right to know which set of conflicting data the Commission proposes to rely upon in considering a rulemaking proposal. In fact, however, the Commission should summarily reject the Petitioners' white and gray area studies as based on logically inconsistent and/or fundamentally flawed assumptions, which ask the Commission to ignore present day realities.

In this regard, Petitioners contend that because their Vernal and Ely permits are unbuilt, *they should not be considered existing stations* for calculating white and gray areas.[3] Without any acknowledgment of the inconsistency of their position, Petitioners claim that the unbuilt television stations *attributable to others* in the markets being abandoned (Vernal and Ely) *should be considered* as existing stations providing reception service.

Specifically, with respect to their white and gray area analysis for Vernal, Petitioners expressly acknowledge that they have taken into account the *pending application* (not even a

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[2] If the Commission goes forward with a revised notice of proposed rulemaking, it also would need to correct and/or clarify the other factual discrepancies that the Joint Commenters pointed out at pages 5-6 of their initial joint comments.

[3] *See Petitioners' Comments* at 4-5; 7-8.

construction permit) for channel 17 at Vernal.[4] Petitioners have thus understated the white and gray area analysis respecting Vernal by including service from an application that has been pending before the Commission for five years and that has never been accepted for filing. Obviously, Petitioners' white and gray area studies for Vernal are seriously flawed.

Petitioners repeat their flawed technical analysis in the context of the *Caliente reallotment* where Petitioners ask the Commission to ignore current realities and look only at what was proposed by a third party in the past. Specifically, Petitioners show no white area loss whatsoever from Ely, even though the Commission staff's data show a white area loss at Ely of 1,591 persons. The different results apparently are based on Petitioners' assumption that a white area analysis for Ely in 2002 should not look at the reduced power levels *as they stand today* of the only other authorized station in Ely (channel 3), but rather should look at the higher power levels for channel 3 *as they were proposed years earlier.*[5] In effect, the Petitioners base their new (2002) white and gray area studies, not on the realities of 2002, but on technical data the Petitioners acknowledge no longer are accurate. In sum, Petitioners' white and gray area technical analyses regarding Vernal and Caliente simply are not credible. Accordingly,

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[4] *See Petitioners' Comments*, Technical Exhibit at 5 and Figure 5: "The determination of the availability of other services to the gain and loss area is based on consideration of pending application for noncommercial educational NTSC television channel 17 at [Vernal]..."

[5] *See Petitioners' Comments* at 5 n. 5. The two cases Petitioners cite in this footnote do not support the proposition of ignoring current reality in favor of past proposed power levels in conducting white and gray area studies. In fact, neither case addresses the appropriate assumptions underlying such studies. Nevertheless, the *Galveston and Missouri City, Texas*, 16 FCC Rcd 747 (2001), case cited by Petitioners is analogous with respect to the appropriate final conclusion. There the Branch rejected a proposal that would have moved the allotment from a community with a larger population (in the instant case, Vernal) to one with a smaller population (in the instant case, Santaquin) because the latter already was amply served by more than a dozen reception services.

Petitioners cannot claim on this data that the proposed allotments should be preferred under television allotment priority Nos. 1 and 3.

III. PETITIONERS CANNOT HAVE IT BOTH WAYS REGARDING THE VERNAL ALLOTMENT

In order to show purported compliance with the Commission's policy prohibiting the removal of a community's sole local transmission service, the Petitioners claim that the unbuilt television station held in Vernal by one of the Petitioners (TV6) should not be considered as an existing station providing local television service.[6] This argument, initially advanced by the Petitioners in their April 2000 petition for rulemaking, was actually rebutted by TV6 itself a mere seven months later. On November 22, 2000, in a request to expedite its application to reduce the power for the Vernal station the Petitioner (TV6) states:

> [T]he public interest will be advanced by having a new television service and *a first local transmission service* available to Vernal. In contrast, if the modification is denied, the station cannot be built at all by December 19, 2000. As a result, the construction permit will be forfeited, and the station itself will be forever lost to the public, because the Commission is no longer accepting applications for analog TV stations, so no new applicant will be able to take the place of TV6, LLC.[7]

Petitioner cannot be permitted to argue *both in favor of and against* a first local transmission service in Vernal.

Nor should the Petitioners be accorded a priority No. 2 for a first local transmission service when they are depriving Vernal of what would have been its first local transmission service. As previously explained in our initial Joint Comments,[8] the Petitioners should not be

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6 *See Petitioners' Comments* at 4.

7 *See Petitioner's Request to Expedite*, Application File No. BMPCT-20001004AEE (filed November 22, 2000).

8 *Joint Comments* at 10.

allowed to sidestep the Commission's prohibition against the removal of a community's sole local transmission service on the basis that the Vernal station is not built. It was the Petitioner's own eleventh hour action that resulted in the tolling of the December 19, 2000, expiration of the Vernal construction permit. The Vernal permittee should not be allowed both to create the circumstances that resulted in the unbuilt status of channel 6 and to rely on the claimed "unbuilt station" policy.[9]

Moreover, even under the Petitioners' own analysis, where neither community subject to a comparative reallotment analysis had another operating local transmission service, the Commission gives preference to the community with the larger population.[10] In the instant case, therefore, the Commission television allotment priority No. 2 favors retention of the current allotment to Vernal (population 6,644) over Santaquin (population 2,386).[11]

IV. THE PRECEDENT CITED BY PETITIONERS AS SUPPORTING AUTHORITY IS EASILY DISTINGUISHED FROM THE INSTANT PROCEEDING

As stated previously, Petitioners' argue that removal of an authorized but unbuilt station does not violate the Commission's prohibition against depriving a community of its only local transmission service.[12] Petitioners also assert that unbuilt construction permits are not existing stations for calculating white and gray areas. Petitioners, however, fail to cite precedent from the

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[9] This is especially true when to do so would leave Vernal without either a current local television transmission service or a Grade B reception service, and the move would be to an area already served by a dozen or so television transmission services. Indeed, as explained in the Joint Commenters' initial comments, retention of the existing allotments furthers television allotment priority 5.

[10] *See Petitioners' Comments* at 3 n. 2.

[11] *See Notice* at ¶ 4.

[12] *Change of Community MO&O*, 5 FCC Rcd at 7096.

full Commission for these propositions.[13] The decisions Petitioners do cite from the Chief, Allocations Branch ("Branch") are not binding upon the Commission.[14] Moreover, these Branch decisions are readily distinguishable.

Petitioners rely primarily upon *International Falls and Chisholm, Minnesota*, 16 FCC Rcd 17864 (2001), where the Branch removed the sole television allotment from International Falls and moved it to Chisholm.[15] The Petitioners' repeated reliance on *International Falls* is surprising since they themselves document the flawed logic of the Branch's analysis in this case.[16] Moreover, unlike the instant case, the reallotments in *International Falls* were not subject to formal opposition, the data showing a net increase in white area population were not challenged,[17] and no issues regarding operation of a digital channel 6 were implicated.[18] Grant of the instant petition is certainly not "compelled" by *International Falls* as Petitioners claim.

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[13] Without such precedent, the Commission staff is without authority to make such a significant policy determination on its own accord. *See* 47 C.F.R. § 0.283(b)(10) (requiring Mass Media Bureau to refer to Commission "novel questions of fact, law, or policy which cannot be resolved under outstanding precedents or guidelines.").

[14] Ample precedents demonstrate that the full Commission is not bound to follow staff actions. *Deltaville Communications*, 11 FCC Rcd 10793, 10798-99 (1996) *citing Carolyn S. Hagedorn*, 11 FCC Rcd, 1695, 1697 (1996); *see also, Amor Family Broadcasting Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990) (decisions by agency's subordinates are not binding on that agency).

[15] *Petitioners' Comments* at 3, 4, 6, 7.

[16] *Petitioners' Comments* at 3 n.2.

[17] *International Falls* also is distinguishable because there were vast differences in the U.S. domestic coverage areas of the facilities being compared there. Over one-third of the Grade B contour of the facility in the community being left (International Falls) would cover Canada rather than the United States in contrast to the facility in the community eventually chosen (Chisholm) where 95% of Grade B contour covered the U.S. *International Falls and Chisholm, Minnesota, Notice of Proposed Rulemaking*, 16 FCC Rcd 7815 (2001).

[18] Similarly, *Lake Havasu City and Laughlin, Nevada* 15 FCC Rcd 11664 (2000) is distinguishable from the instant case. Unlike here, in *Lake Havasu City* the NTSC television channel at issue had a digital pair (and no issues regarding operation of a digital channel 6

Farmington and Gallup, New Mexico, 11 FCC Rcd 2357 (1996) *recon. denied*, 14 FCC Rcd 18983 (1999) is similarly distinguishable. Once again, this was a staff decision not binding upon the Commission, and no issues concerning digital channel 6 were implicated. In contrast to the instant situation, the petitioner in *Farmington* concluded that activating the station in its existing community would not be economically viable. Furthermore, in *Farmington* the facilities contemplated by the petitioner's existing allotment would have been utilized only for the satellite retransmission of another station whose programming was already provided to the petitioner's existing community of license via cable and translator service. Hence, unlike the instant matter, the Branch's decision to remove the allotment from the existing community (Gallup) did not, as a practical matter, result in loss of service to the community.[19] Finally, unlike the *Santaquin reallotment*, the community losing the allotment (Gallup) had three VHF allotments, each of which could have been applied for at the time of the Allocation Branch's February 1996 decision (in contrast, as stated previously, in Vernal an application has been pending for the only other theoretically available allotment for over five years and the allotment cannot be applied for if it becomes vacant).

(Continued...)
were implicated), and no formal opposition to the reallotment had been filed. In fact, the most significant factor in the *Lake Havasu* reallotment apparently was the unavailability of commercial electric power at the only developed site that could accommodate the transmitter for the initial authorization, thereby hampering the permittee's ability to provide adequate service for the initial allotment. *Id.* at para. 5, 7. Moreover, once again, the decision not to treat the reallotment of the station as the removal of the community's local service was only a Branch decision, not approved by the full Commission.

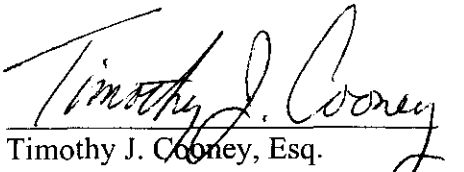
[19] *Farmington*, 11 FCC Rcd at 2358.

V. CONCLUSION

In view of the above, Joint Commenters submit that the Petitioners have failed to make a public interest showing in support of the proposed reallotments. Their claim that the proposed reallotments would further priorities Nos. 1, 2, and 3 is unpersuasive and fails to address the significant adverse public interest consequences of the proposed reallotments. When the significant matters raised herein and in the initial comments of the Joint Commenters and Ulloa are considered, the Commission must reject the proposed reallotments and retain the current allotments for Vernal, Utah and Ely, Nevada.

Respectfully submitted,

JOINT COMMENTERS



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CERTIFICATE OF SERVICE

I, Paula Lewis, hereby certify that on this 29th day of January 2002, a copy of the foregoing document was served upon the parties listed below via hand delivery and U.S. mail, postage prepaid.

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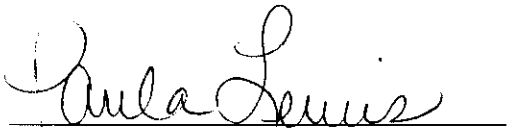

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